United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1196

To be argued by
JONATHAN J. SILBERMANN

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

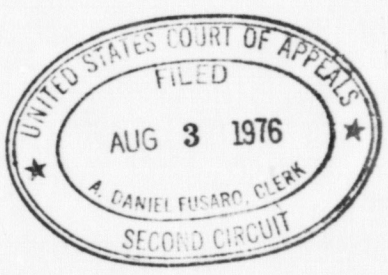
MOHENDRA BUDHU,

Defendant-Appellant.

Docket Number 76-1196

REPLY BRIEF FOR APPELLANT
MOHENDRA BUDHU

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- MOHENDRA BUDHU, Defendant-Appellant.	DOCKET NUMBER 76-1196

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I

The Government argues that since appellant was convicted on three counts and received concurrent sentences on each, the concurrent sentence doctrine precludes review of appellant's conviction on Count Three of the indictment. The Government's reliance on that doctrine in this case is totally misplaced.

The concurrent sentence doctrine, a doctrine for which there is no "satisfactory explanation," Benton v. Maryland, 395 U.S. 784, 789 (1969), has been defined in the following manner:

> that if the defendant had validly been convicted on any one count, 'the other counts need not be considered'. Benton v. Maryland, supra, 395 U.S. at 789. See also Hirabayashi v. United States, 320 U.S. 81 (1943).

While questioning the continued validity of this discretionary power,[1] this Court has stated that in order to invoke the concurrent sentence doctrine "no undesirable consequences" (emphasis added) can flow from its application. United States v. Febre, 425 F.2d 107, 113 (2d Cir. 1970).

Here, under the terms of the statute, upon subsequent conviction, appellant will be subjected to an increased sentence and felony adjudication.[2] These consequences are sufficient to require review by this Court, even though appellant has already served his term of imprisonment:

> Although the term [of imprisonment] has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties . . . United States v. Morgan, 346 U.S. 502, 512-13 (1954). See also, Sibron v. New York, 392 U.S. 40, 55 (1968).

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[1]Without deciding whether the concurrent sentence doctrine should be abolished altogether, the Supreme Court has indicated that a stronger case for its total abolition can be made in cases, such as this, on direct appeal. Benton v. Maryland, 395 U.S. 784, 793 n.11 (1969). See also, United States v. Febre, 425 F.2d 107, 113 (2d Cir. 1970); United States v. Cioffi, 487 F.2d 492, 498 (2d Cir. 1973); Note, Federal Concurrent Sentence Doctrine, 70 Colum. L. Rev. 1099 (1970).

[2]The first violation of 8 U.S.C. §1325 is a misdemeanor carrying a maximum penalty of six months imprisonment and $500 fine or both, while subsequent convictions are felonies, allowing the imposition of a term of two years' incarceration and $1000 fine or both.

Indeed, the Government concedes that appellant's conviction on Count Three has independent collateral consequences and that the failure to vacate the conviction on this count will subject appellant, upon a subsequent violation, to a felony charge and longer sentence. (Government's Brief at 7). Despite those facts, the Government argues that these consequences are speculative and insufficient justification for this Court's review of appellant's conviction. However, that position has been rejected by the Supreme Court which has stated that even a "mere possibility" of collateral consequences makes the concurrent sentence doctrine inapposite. Benton v. Maryland, supra, 395 U.S. at 790; Sibron v. New York, 392 U.S. 40, 55 (1968). The collateral consequences that flow from appellant's conviction on Count Three require that this Court review appellant's claim.

II

Appellant contends that 8 U.S.C. §1329, which allows prosecution in the district of arrest, conflicts with the specific terms of the Sixth Amendment, which requires trial where the crime was committed. While not disputing this repugnance, the Government, instead, seeks to rely on Congress' authority to regulate the admission and exclusion of aliens in order to justify the validity of the statute in question. This Congressional power is beside the point since this is a criminal prosecution, and not a deportation or exclusion proceeding, which is considered essentially civil in nature.

Reduced to its essentials, the Government's position is that the protections of the Sixth Amendment do not apply or apply in modified form to aliens. (Government's Brief at 14). This is incorrect both under relevant case law - Wong Wing v. United States, 163 U.S. 228, 237 (1896); Harisiades v. Shaughnessy, 342 U.S. 580, 586 n.9 (1952); see also, Gordon and Rosenfeld, Immigration Law and Procedure, §1.31 at 1-115; Provisions of the Federal Constitution Invocable by Aliens Independently of Treaty, 68 L. Ed. 255, 261-62 - and because the Sixth Amendment itself applies to all criminal prosecutions.

Indeed, even the cases cited by the Government make clear the distinction between criminal cases and the power of Congress to regulate the admission or deportation of aliens. See Kliendienst v. Mandel, 408 U.S. 753, 765-66 (1972); Harisiades v. Shaughnessy, 442 U.S. 580, 586 n.9 (1952); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); Guan Chow Tok v. Immigration and Naturalization Service, Docket No. 75-4229, slip op. 4827, 4829 (2d Cir. July 8, 1976); Gordon and Rosenfeld, Immigration Law and Procedure, §2.2a at 2-13. See also, Zakonaite v. Wolf, 226 U.S. 272 (1912); Turner v. Williams, 194 U.S. 279 (1904); Wong Wing v. United States, 163 U.S. 228 (1896). This distinction has long been accepted. Thus, while certain constitutional guarantees are required in every criminal case, they may be unnecessary in order to admit or expel aliens. Zakonaite

v. Wolf, 226 U.S. 272, 275 (1912); Turner v. Williams, 194 U.S. 279, 290-91 (1904); Wong Wing v. United States, 163 U.S. 228, 237 (1896).

The crime alleged here in Count Three is complete in the judicial district where entry occurred.[3] United States v. Cores, 356 U.S. 405, 408 n.6 (1958). (See Appellant's Brief at 11). Because there was no proof of entry in the Southern District and because venue lodged under 8 U.S.C. §1329 is invalid under the specific terms of the Sixth Amendment, reversal of appellant's conviction on Count Three is required.

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[3]The Government suggests that the offense involved is a continuing one. (Government's Brief at 15). This is incorrect. United States v. Cores, 356 U.S. 405, 408 n.6 (1958) (Appellant's Brief at 11). Moreover, the Government speculates that 8 U.S.C. §1325 was designed to deal with the "economic, social and political problems created by the presence in this country" of illegal aliens (Government's Brief at 15). This too is incorrect since Congress has attempted to deal with these complex problems through deportation and not criminal prosecution. 8 U.S.C. §1221 et seq. Indeed, when Congress has chosen to prohibit aliens from illegally remaining in the United States, it has specifically done so. See 8 U.S.C. §§1282(c) and 1326(2).

CONCLUSION

FOR THE FOREGOING REASONS, AND THE REASONS SET FORTH IN APPELLANT'S MAIN BRIEF, THE JUDGMENT OF THE DISTRICT COURT MUST BE REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS COUNT THREE

Respectfully submitted,

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